Arab-Malaysian Credit Bhd v Tan Seang Meng

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-03-3-1994
GOPAL SRI RAM, VC GEORGE AND ABU MANSOR JJCA
27 FEBRUARY 1995

Civil Procedure *— Writ of summons — Extension of — Writ expired — Whether court has jurisdiction to grant a series of extensions to resuscitate writ — Rules of the High Court 1980 O 6 r 7*

Civil Procedure *— Jurisdiction — Extension of writ — Whether court has jurisdiction to grant a series of extensions to resuscitate writ which has expired — Difference between court having no jurisdiction and court declining to exercise discretion to grant relief — Rules of the High Court 1980 O 3 r 5, O 6 r 7 & O 92 r 4*

The issue which arose for decision in this appeal was whether it was permissible for the court to grant a series of 12-month extensions to resuscitate a writ which had expired in August 1986. The plaintiff had obtained, through eight separate and distinct applications, extensions which brought back to life its writ which had expired. On being served with the extended writ, the defendant entered conditional appearance and applied to set aside the several orders of extension. The senior assistant registrar refused the application but on appeal the judge allowed the appeal and discharged all the eight extension orders. The judge held that the court did not have jurisdiction to make such an extension. The plaintiff appealed to the Court of Appeal.

Held, allowing the appeal:

(1) Under O 6 r 7 of the Rules of the High Court 1980 ('the RHC'), the court has jurisdiction to extend a writ even after its expiry. Whether that jurisdiction ought to be invoked in a given case is a matter within the discretion of the court hearing an application to extend.

(2) Quite apart from O 6 r 7 of the RHC, there is wide power under O 3 r 5 conferred upon the High Court to extend time. Even the restriction on granting more than one extension of 12 months expressed in O 6 r 7 may, in appropriate cases, be overcome by having resort to O 92 r 4 which reserves the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

(3) A rule of court should not be construed so as to produce unfairness or a manifest injustice. The High Court thus has ample jurisdiction to grant the plaintiff in this case the several extensions sought by it of its writ and the judge was clearly wrong in holding that the court had no such jurisdiction. To say that a court has no power to make an order or to grant relief is quite different from saying that a particular order or relief will not, in accordance with

settled principles, be granted. A refusal in such circumstances is in fact an exercise of jurisdiction and not a denial of it. A

(4) The judge, however, did not state that even if his decision on jurisdiction was wrong, he would nevertheless not have exercised his discretion to extend time in the plaintiff's favour. Had he done so, the court may have heard the rival contentions on the merits of each case. As matters stood, the court was of the opinion that both parties should be given the opportunity to reventilate the merits of their cases. The defendant's summons was thus remitted back to the High Court to be decided on the merits. B C

[Bahasa Malaysia summary

Isu yang timbul untuk keputusan di dalam rayuan ini adalah sama ada mahkamah boleh memberikan satu siri perlanjutan masa 12 bulan untuk menghidupkan semula satu writ yang telah pun luput pada Ogos 1986. Plaintif telah memperolehi, melalui lapan permohonan yang berasingan dan tersendiri, perlanjutan masa yang menghidupkan semula writnya yang telah luput itu. Setelah writ yang dilanjutkan itu disampaikan kepada defendan, ianya telah memasukkan kehadiran bersyarat dan memohon untuk mengetepikan perintah perlanjutan itu. Penolong kanan pendaftar telah menolak permohonan itu tetapi atas rayuan, hakim telah membenarkan rayuan itu dan mengetepikan kesemua lapan perintah perlanjutan itu. Hakim telah memutuskan bahawa mahkamah tidak mempunyai bidang kuasa untuk membuat perlanjutan sedemikian. Plaintif telah membuat rayuan kepada Mahkamah Rayuan. D E F

Diputuskan, membenarkan rayuan itu:

(1) Di bawah A 6 k 7 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), mahkamah mempunyai bidang kuasa untuk melanjutkan sesuatu writ biarpun selepas ianya luput. Sama ada bidang kuasa itu patut digunakan di dalam sesuatu kes adalah satu perkara yang bergantung kepada budi bicara mahkamah yang mendengar permohonan untuk perlanjutan itu. G

(2) Selain daripada A 6 k 7 KMT, terdapat kuasa yang luas di bawah A 3 k 5 yang diberikan kepada Mahkamah Tinggi untuk melanjutkan masa. Sekatan terhadap pemberian lebih daripada satu perlanjutan sepanjang 12 bulan yang terkandung di dalam A 6 k 7 juga boleh, di dalam kes yang sesuai, di atasi dengan menggunakan A 92 k 4 yang merizabkan kuasa sedia ada mahkamah untuk membuat apa-apa perintah seperti yang diperlukan untuk menghalang ketidakadilan atau suatu penyalahgunaan proses mahkamah. H I

(3) Satu aturan mahkamah tidak patut ditafsirkan sehingga mendatangkan ketaksaksamaan atau ketidakadilan yang ketara. Mahkamah Tinggi oleh itu mempunyai bidang kuasa yang cukup untuk memberikan plaintif di dalam kes ini perlanjutan-

perlanjutan yang dipohon untuk writnya dan hakim dengan jelas telah tersilap apabila beliau memutuskan bahawa mahkamah tidak mempunyai bidang kuasa sedemikian. Untuk mengatakan bahawa mahkamah tidak ada kuasa untuk membuat sesuatu perintah atau memberikan relief sangat berbeza daripada mengatakan bahawa perintah atau relief yang tertentu itu tidak akan, mengikut prinsip yang mantap, diberikan. Satu keengganan dalam keadan sedemikian adalah pada hakikatnya satu penggunaan bidang kuasa dan bukan satu penafian bidang kuasa itu.

(4) Hakim walau bagaimanapun tidak memutuskan bahawa sekiranya keputusannya tentang bidang kuasa itu adalah salah, beliau namun demikian tidak akan menggunakan budi bicaranya untuk melanjutkan masa yang memihak kepada plaintif. Jika beliau telah berbuat demikian, mahkamah mungkin mendengar hujah berlawanan tentang merit setiap kes. Dalam keadaan kes ini, mahkamah berpendapat bahawa kedua-dua pihak itu patut diberikan kesempatan untuk mengutarakan semula merit kes-kes mereka. Lantaran itu, saman defendan diremit semula ke Mahkamah Tinggi untuk diputuskan atas meritnya.]

Notes

For a case on extension of a writ of summons, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 3666.

Cases referred to

Bernstein v Jackson [1982] 2 All ER 806; [1982] 1 WLR 1082 (refd)

Chappell v Cooper [1980] 2 All ER 463; [1980] 1 WLR 958 (not folld)

Heaven v Road and Rail Wagons Ltd [1965] 2 QB 355; [1965] 2 All ER 409; [1965] 2 WLR 1249 (refd)

Kleinwort Benson Ltd v Barbrak Ltd [1987] AC 597; [1987] 2 All ER 289 (refd)

Leal v Dunlop Bio-Processes International Ltd [1984] 2 All ER 207; [1984] 1 WLR 874 (refd)

Official Receiver, Liquidator of Jason Textile Industries Pte Ltd, The v QBE Insurance (International) Ltd [1989] 1 MLJ 1 (not folld)

Othman bin Baginda, Dato Menteri, & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 (folld)

Pacific Centre Sdn Bhd v United Engineers (M) Bhd [1984] 2 MLJ 143 (refd)

Rediffusion (Hong Kong) Ltd v A-G of Hong Kong [1970] AC 1136; [1970] 2 WLR 1264 (folld)

Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 MLJ 292 (folld)

Singh v Duport Harper Foundries Ltd [1994] 2 All ER 889 (refd)

Waddon v Whitecroft Scovill Ltd [1988] 1 All ER 996; [1988] 1 WLR 309 (refd)

Legislation referred to

Rules of the High Court 1980 O 3 r 5(1), (2), O 6 r 7(1), (2), O 92 r 4
Rules of the Supreme Court 1965 O 6 r 8 [UK]
Limitation Act 1939 s 2D [UK]

Appeal from: Civil Suit No C4987 of 1985 (High Court, Kuala Lumpur)

K Anantham (*P Pereira* with him) (*Skrine & Co*) for the appellant.
Augustine C Nathan (*Ramesh Gopal* with him) (*Paul Chong & Kraal*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): We heard this appeal on 15 February 1995, and, at the conclusion of argument, reserved judgment. Our conclusions and the reasons for them are now produced. For ease of reference, the parties before us will, in this judgment, be described as plaintiff and defendant, respectively, although there were ten defendants in the court below (nine of whom are not before us) and the respondent to this appeal is the ninth defendant. Also, all references in this judgment to rules of court are to the Rules of the High Court 1980 ['the Rules'] unless otherwise stated.

The background

The plaintiff, although its name may not so suggest, is a licensed lender of money. The defendant is one of the guarantors of a loan advanced by the plaintiff to the first defendant in the court below. There was default in repayment of the principal and interest. So the plaintiff, on 22 August 1985, launched an action by a writ of that date. The guarantee executed by the defendant gave an address as his. The plaintiff attempted service of the writ at that address with no success. Encik Anantham, who appeared for the plaintiff on this appeal, complained that the difficulties encountered by the plaintiff in effecting service were occasioned by the defendant changing his address and his failure to keep the plaintiff informed of that change. Because of the conclusion we have arrived at, we are spared the burden of having to deal with this complaint and Encik Augustine Nathan's most persuasive response to it, although we will mention that response at the appropriate place in this judgment.

Faced with the inability of effecting personal service, the plaintiff, on 8 January 1986, obtained an order for substituted service by means of posting a copy of the process at the defendant's last known address and by advertising it in the usual way. Service in terms of that order was effected on 13 January 1986. No appearance having been entered, the plaintiff entered judgment in default against the defendant on 20 May 1986. Apparently, the defendant had heard nothing of all this until much later.

A Encik Nathan informs us that the plaintiff took out bankruptcy proceedings based on the judgment in default and it was only then that the defendant took steps to have the judgment in default set aside. There is evidence on record, relied upon by both sides before us, to show that the parties entered into negotiations to resolve the dispute. Counsel for the plaintiff suggests that the upshot of those negotiations was an B acknowledgment of the debt, whilst counsel for the defendant strenuously argues that what was arrived at amounts to an agreement to pay and to accept a lesser sum. Happily, we are, for reasons that will soon become apparent, also spared from dealing with these arguments.

The defendant's application to set aside the default judgment was C filed on 21 August 1992, some six years and three months after the entry of judgment. That application was heard and an order in terms of it made on 7 June 1993. The learned judge gave written reasons for his decision. His judgment is reported in [1993] 4 CLJ 48 to which our attention was correctly drawn by Encik Nathan. We are grateful to him for doing so. The D judge found the order for substituted service of the writ to be fatally flawed on grounds now no longer relevant. Because of this he set aside the default judgment ex debito justitiae. The plaintiff did not appeal against that decision.

The finding of the learned judge that that order for substituted service was bad carried serious consequences for the plaintiff. It meant E that the service of the writ under a defective order was bad and that the writ had never been served at all. It then followed that the writ had, at the end of 12 calendar months from the date of its issue, which is the life given it under the Rules, expired and was now no longer available to be validly served. Finally, there is the bar in the Rules about the making of more than F one order for the extension of a writ for 12 months at any given time. We will refer to the particular Rule later. But the point we wish to make here is that, in the state of the authorities upon the subject, the plaintiff found itself unable to extend the writ by a single order of court and thereby to resuscitate that originating process and give it life from the date of its expiry.

G The plaintiff met these difficulties by a simple yet ingenious method. It made eight separate and distinct applications, by each of which it sought for and obtained a 12 month extension. The total of all these extensions had the desired effect of bringing back to life the expired writ. All these eight applications were made by ex parte summonses and this accorded H with the procedure laid down by the Rules for the making of such applications.

The defendant, on being served with the extended writ, entered a conditional appearance to it, and, on 22 February 1994, applied to set aside the several orders extending the writ. On 5 April 1994, the senior I assistant registrar refused the application, whereupon the defendant appealed to the judge in chambers against the refusal. On 8 July 1994, the appeal came before the same learned judge who had set aside the default judgment. After hearing argument, the learned judge allowed the appeal

and discharged all the eight extension orders. It is against that decision that this appeal has been brought.

The judgment appealed from

The only ground on which the learned judge held against the plaintiff was that there was no jurisdiction in the court to grant the extensions applied for and obtained by the plaintiff. In arriving at his conclusion the learned judge relied upon and drew support from two decisions. The first is the decision of the Court of Appeal of Singapore in *The Official Receiver, Liquidator of Jason Textile Industries Pte Ltd v QBE Insurance (International) Ltd* [1989] 1 MLJ 1 (not folld), which the learned judge described as a case not that different on its facts from the present. The second is the English Court of Appeal decision in *Leal v Dunlop Bio-Processes International Ltd* [1984] 2 All ER 207; [1984] 1 WLR 874.

The learned judge, however, did not go on to say that even if he was wrong, he was exercising discretion against the plaintiff in the circumstances of the case although there appears to have been argument addressed to him by both sides on the respective merits of each litigant's case. The reasoning of the learned judge is expressed in the following words uttered after citing a passage from *QBE Insurance*:

> Berdasarkan prinsip ini dan memandangkan kelapan-lapan perintah yang diberikan oleh pendaftar dalam kes sekarang, adalah jelas bahawa pembaharuan yang diluluskan itu telah melebihi had 12 bulan. *Pada hemat saya, pendaftar atau mahkamah tidak mempunyai bidangkuasa untuk membuat pembaharuan seperti ini.* Pada hemat saya perkataan 'from time to time' dalam A 6 k 7(2) itu tidak memberi makna writ boleh dibaharui berturut-turut sebanyak lapan kali. Di sini saya juga ingin merujuk kepada kes yang terbaru diputuskan di United Kingdom iaitu *Singh v Duport Harper Foundries Ltd* [1994] 2 All ER 889 di mana di ms 893 di mana mahkamah telah memberikan makna perkataan 'from time to time' sebagai:
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> > 'The words in RSC O 6 r 8(2) "from time to time" refute the suggestion that more than one renewal can be granted on the same day.'
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> Peruntukan RSC O 6 r 8(2) itu adalah sama dengan peruntukan A 6 k 7(2) kita dengan sedikit perbezaan bersangkutan tempoh masa sahaja.
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> Setelah mengambil pakai prinsip undang-undang yang diputuskan dalam kes-kes di atas maka saya dapati permohonan plaintif untuk membaharui writnya yang telah luput, sebanyak lapan kali berturut-turut itu adalah tidak sah. Oleh itu saya membenarkan dengan kos rayuan defendan kesembilan dan mengenepikan kelapan-lapan perintah pendaftar. (Emphasis added.)

The approach taken by the learned judge, and, in particular, his finding that he lacked jurisdiction in the passage which we have underscored, coupled with the nature of the submissions addressed to us by counsel necessitates an examination of the law and the authorities upon the subject at hand.

The law

The relevant provisions of the Rules that operate in this case are the following:

A Order 6 r 7(1) and (2) which read as follows:

(1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for 12 months, beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the
B concurrent writ.

(2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before
C that day or such later day (if any) as the Court may allow.

Order 3 r 5(1) and (2) which read as follows:

(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any
D proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

Finally, O 92 r 4 which provides:

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For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

The scope, operation and effect of O 6 r 7 has been considered in a
F number of cases. No advantage will be gained by going through all of them here. There is a need, however, to deal with some of them to see how the courts in England have interpreted their O 6 r 8 which, until its revision in June 1990, was *ipsissima verbis* our O 6 r 7. That is by no means to say that we will slavishly follow the English practice on the administration of the
G Rule, or indeed any Rule: for in the end, it is for us to decide what our law or practice on the subject ought to be, and if this is similar to that obtaining in England, then it is a matter of coincidence that we think alike.

On the English practice, we do not think it necessary to commence before the decision of the House of Lords in *Kleinwort Benson Ltd v*
H *Barbrak Ltd* [1987] AC 597, which is also reported in [1987] 2 All ER 289. It is to the latter report that we shall make reference, since it was from that report that Encik Anantham read passages to us during argument. Lord Brandon explained the English position in the following way ([1987] AC 597 at p 615; [1987] 2 All ER 289 at p 294):

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Four main differences are to be observed in the new rule, O 6 r 8, by comparison with the previous rule, O 8 r 1. First, there is the change of terminology from renewal of a writ to extension of its validity. Second, there are no longer any express terms making it a condition of allowing the extension of the validity of a writ that the court should be satisfied that reasonable efforts have been made to serve a defendant who has not been

> served, or that there is some other good reason for such allowance. Third, there are no longer any express terms concerning the effect of extension in preventing the operation of a statute of limitation. Fourth, there is an express provision permitting a plaintiff to apply for an extension not only before the validity of a writ has expired, but also after such expiry, if and to the extent that the court allows. This makes it unnecessary for a plaintiff seeking an extension of the validity of a writ after it has expired to rely on any other rule for that purpose.

Now, we unhesitatingly accept the caveat administered to us by Encik Nathan in his submission that the remarks made by Lord Brandon in the speech we have reproduced are mere obiter dicta. But that caveat does not denude the passage cited of its content because the observations of Lord Brandon do nothing more than to highlight the salient aspects of the Rule which are plainly visible to one's intellect upon a reading of it and upon a comparison of it with its precursor. What comes through when a reading of the speech as a whole is undertaken is that a court has undoubted jurisdiction to extend a writ even after its expiry. Whether that jurisdiction ought to be invoked in a given case is a matter within the discretion of the court hearing an application to extend: *Waddon v Whitecroft Scovill Ltd* [1988] 1 All ER 996; [1988] 1 WLR 309.

We now turn to the passage in the *Supreme Court Practice 1995* which is against the plaintiff and which was put to Encik Anantham during the course of his argument before us. It appears at p 60 of the text as para 6/8/10 and this is what it says:

> The application to renew the writ must be made within the appropriate period of validity from the day of the issue thereof including the day of such date, or in the case of a writ already renewed before the expiry period of renewal. The court, however, is given express power to allow an application to be made after the expiry of the appropriate period from the date of its issue (see para (2)), but it must be made within the appropriate period of the first expiry (*Chappell v Cooper* [1980] 1 WLR 958; [1980] 2 All ER 463, CA).

Encik Anantham argues that this passage is wrong, and that *Chappell v Cooper* [1980] 2 All ER 463; [1980] 1 WLR 958 which is cited as authority for the proposition advanced by the editors of the *Supreme Court Practice 1995* does not in truth support that proposition.

Chappell primarily concerned an application to extend time under s 2D of the English Limitation Act 1939, which was introduced by an amendment made in 1975. That section vests in a court the power to extend any period of limitation prescribed by the Act of 1939. The facts of that case are not relevant to the present appeal and no useful purpose will be achieved by their recitation. However, in the course of delivering the judgment of the Court of Appeal, Roskill LJ (as he then was) made the following comment when dealing with the associated appeal that was taken together with *Chappell*:

> This has led to an interesting argument from counsel for the plaintiff. It has long been the law, and the law was authoritatively stated by Megaw J in *Heaven v Road and Rail Wagons Ltd* [1965] 2 All ER 409; [1965] 2 QB 355

that *in general in the absence of good or sufficient reason the court will not exercise its discretion in favour of the renewal of a writ after the period allowed for service has expired if the effect of doing so will be to deprive the defendant of the benefit of a limitation period which had accrued.* I take that summary of the effect of the decision in *Heaven* from the note to RSC O 6 r 8, in the *Supreme Court Practice 1979*, vol 1, p 57, para 6/8/3. Megaw J's decision has been accepted as correct many times in this court. But it has been strenuously argued that as a result of the introduction of the Limitation Act 1975 *Heaven*'s case is no longer binding, and that it is open to this court, and indeed necessary for this court, wholly to reconsider its practice (for this is basically a matter of practice rather than substantive law) regarding granting leave to extend the time for service of the writ which has ceased to be valid because it has not been timeously served. It is said that it is now open to us to reconsider the position and to grant the requisite extension of time in any case where it seems equitable for us to do so, notwithstanding that so to do would be to deprive a defendant of the accrued benefit of a period of limitation prescribed by the Limitation Act 1939, as subsequently amended. The argument is designed to put a plaintiff who has failed timeously to serve his writ and who ex hypothesi is unable to obtain the benefit of s 2D in the same position as if he had obtained that benefit, because although he cannot successfully pursue a second action, as he cannot have the relevant limitation provisions 'disapplied', he nonetheless, so the argument runs, can be allowed to go on with his first action and serve that writ many, many months, or indeed years, after that writ ought to have been but was not served.

There is one short answer to this submission. That was given by counsel for the defendant at the outset of his submissions. That answer turns on the true construction of RSC O 6 r 8(2) which provides:

> 'Where a writ has not been served on a defendant the Court may by order extend the validity of the writ from time to time for such period, not exceeding twelve months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.'

Let me give the dates. The writ in the action of *Player v Bruguiere* was issued on 6 December 1974. The 12 months therefore expired on 5 December 1975, and the second period of 12 months, which would be the maximum of which a timeous extension might be allowed, would have run out on 5 December 1976. But the affidavit in support of this application was not sworn until 13 June 1979, some 3½ years after that last date. *In view of those dates it seems to me clear, with all respect to counsel for the plaintiff, beyond doubt that we have no power under the rules to grant the extension sought.* (Emphasis added.)

The reference to the absence of a power to renew contained in the sentence that we have last underlined in the passage cited must, in our judgment be read in the context of the well established practice of an English court as expressed by Megaw J in *Heaven v Road and Rail Wagons Ltd* [1965] 2 QB 3557; [1965] 2 All ER 409; [1965] 2 WLR 1249 in the sentence first underscored. To put it another way, when Roskill LJ said that there was no power to extend, he was speaking of the settled practice of English courts to exercise discretion against a plaintiff who has let a writ expire without taking any steps to timeously effect service of it. And if he

has, by his lack of vigilance, permitted limitation to run in the defendant's favour, then this is an added consideration for refusing an extension. A

Now, it is one thing to say that a court has no power to make an order or to grant relief and quite a different thing to say that a particular order or relief will not, in accordance with settled principles, be granted. A refusal in such circumstances is in fact an exercise of jurisdiction and not a denial of it. This important distinction of principle is well brought out by the following passage in the advice of the Privy Council delivered by Lord Diplock in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136; [1970] 2 WLR 1264 which was applied by our Federal Court in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29: B C

> When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, ie to embark upon the inquiry whether facts exist which would entitle the court to grant the relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it. D

Although those words were spoken in the context of declaratory relief, they are of universal application and are analogously relevant to the present case where a rule of court has expressly conferred a wide discretion on the court. E

We are therefore satisfied that *Chappell*, when carefully read and properly understood is not authority for the proposition stated in para 6/8/10 of the *Supreme Court Practice 1995* and that the statement of principle contained in that paragraph is erroneous, is not good law and should not be followed. F

We next turn to deal with the decision in *Singh v Duport Harper Foundries Ltd* [1994] 2 All ER 889, an authority cited to us by counsel on both sides. In that case, the plaintiff took out a writ on 5 April 1991, claiming damages for personal injuries. Under the amended rule of court, the writ was valid for four months. The plaintiff's solicitors failed to serve the writ within its lifetime, erroneously believing that service could only be effected with the plaintiff's medical report. Five months after the writ had expired, the plaintiff applied for its extension. The district judge granted the extension and the defendant's appeal from him to the judge was dismissed. On further appeal to the Court of Appeal, the defendant argued, relying on *Chappell*, that the district judge lacked jurisdiction to extend the writ. The Court of Appeal allowed the appeal, holding that the plaintiff had failed to provide a satisfactory explanation for the delay in effecting service of the writ on the defendant. G H I

Farquharson LJ, with whom the other members of the court agreed, found the authorities on the subject difficult to reconcile. But he ought to have encountered no such difficulty if he had borne in mind the distinction

A we have drawn in this judgment between a denial of jurisdiction and a settled practice of the court to exercise discretion in a particular way if there is found to exist a particular set of facts. When discretion falls to be exercised, each case turns upon its own peculiar facts and it is axiomatic that one set of facts is no precedent for another set of facts, no matter how
B close the resemblance between the two or more factual situations.

It is therefore hardly surprising that, after considering several authorities, Farquharson LJ expressed the following view:

> RSC O 6 r 8 was intended to provide a code whereby undue delay in the service of writs is avoided. It is for this reason that the period for the validity
C of a writ was recently reduced from 12 months to four. Only in the most exceptional circumstances as described in para 5 below will the court allow a further extension beyond that permitted by the rule. For that reason I am unable to agree with the interpretation put upon it by Potter J in *Caribbean Gold Ltd v Alga Shipping Ltd* [1993] 1 WLR 1100.
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> It is difficult to reconcile the authorities cited above but the following
D propositions should be applied: (1) Where a litigant seeks an extension of the validity of a writ the provision of RSC O 6 r 8 will apply. (2) An application under that rule must be made during the validity of the writ, ie four months in the usual case, or during the four months next following. (3) Only one extension of time can be granted on a particular application and that must be for a period not exceeding four months. (4) If the litigant has
E not conformed with the requirements of the Rule he cannot be granted relief under O 6 r 8. (5) In exceptional circumstances and where the interests of justice so require the court will entertain an application to extend the validity of the writ under the provisions of O 2 r 1 and O 3 r 5. Before the court will extend the validity of the writ the applicant must show that there is good reason for such an extension, and where appropriate
F provide a satisfactory explanation for the failure to apply during the period of the original validity (see *Kleinwort Benson Ltd v Barbrak Ltd, The Myrto (No 3)* [1987] 2 All ER 289; [1987] AC 597).

We now turn to the cases relied on by the learned judge. The first of these is the decision in *QBE Insurance* [1989] 1 MLJ 1 which the learned judge
G found not dissimilar from the instant case. The facts of *QBE Insurance* are these. On 2 December 1980, the plaintiff issued a writ against the defendant insurers claiming damages for loss by a fire, an event covered by the policy of insurance issued by the latter to the former. The writ remained unserved for the duration of its life. It then expired on 1 December 1981. On 7 August 1985, ie 56 months after the writ was issued, the plaintiff applied
H to renew it for five successive 12-month periods from 1 December 1981 to 2 December 1986. Having obtained an order to that effect, the writ was served on the defendant who applied to set it aside. The defendant succeeded at all levels. In the Court of Appeal, Wee Chong Jin CJ, made the following observation:

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> We accepted the respondents' contention that the court's power under O 6 r 7 is limited to extending the validity of the writ for a maximum of 12 months at any one time. This means that an application for the renewal must be made at the latest within 12 months of the expiry of the writ. There

is no power to grant two or more successive renewals to bring the writ up to date. A

In our judgment, this is the logical construction of the rule as the court can extend the validity of the writ only for a maximum of 12 months at any one time. This construction is also supported by authority.

The learned Chief Justice of Singapore then went on to refer to *Chappell* [1980] 2 All ER 463; [1980] 1 WLR 958, to *Leal* [1984] 2 All ER 207; [1984] 1 WLR 874 and to *Bernstein v Jackson* [1982] 2 All ER 806; [1982] 1 WLR 1082 and relied on passages in these cases to support the conclusion that the plaintiff/appellant in that case was not entitled to retrospectively renew his writ for five successive 12-month periods. B

Leal concerned the validating of the service of an expired writ out of jurisdiction, no leave having been first obtained before effecting service and limitation having set in. The English Court of Appeal (per Slade LJ [1984] 2 All ER 207 at p 215; [1984] 1 WLR 874 at p 885)held against the plaintiff because: C

> ... it is a long-established principle that the court will not exercise its discretion so as retrospectively to extend the validity of a writ beyond the period of 12 months allowed for its service, unless there are exceptional circumstances sufficient to justify such extension. I agree that no such exceptional circumstances have been shown in the present case. Accordingly, in my opinion, in response to the plaintiff's application under O 6 r 8, the registrar could not in the proper exercise of his discretion have extended the validity of the writ. D E

Conclusion

Having addressed our minds to the plain words of O 6 r 7, and the decided cases in which it has been considered, we are satisfied that the High Court had ample jurisdiction to grant the plaintiff in the instant case the several extensions sought by it of its writ. F

Quite apart from O 6 r 7, there is wide power under O 3 r 5 conferred upon the High Court to extend time. Even the restriction of granting more than one extension of 12 months expressed in O 6 r 7 may, in appropriate cases, be overcome by having resort to O 92 r 4 (absent in the English RSC) which is a jurisdictional provision. (See *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143.) G

Further, in a recent and yet unreported judgment of this court, reference has been made to the important principle that a rule of court should not be construed so as to produce unfairness or a manifest injustice. (See *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd*, Court of Appeal Civil Appeal No P–02–7–94 [since reported in [1995] 1 MLJ 292].) Surely, this principle may be invoked to overcome any technical obstacles in the way of achieving substantial justice in a case where a pedantic approach to a rule of court will result in injustice. H I

In the premises, we are satisfied that the learned judge was clearly wrong in holding that the court had no jurisdiction to the make the orders it did. But that is not the end of the matter. For the learned judge did not

A go on to say that even if he was wrong in holding that jurisdiction was absent, he would nevertheless have held that discretion ought not to be exercised in the plaintiff's favour. Had he done so then we may have heard the rival contentions about the merits of each litigant's case. As matters stand, we are deprived of the benefit of having the views of the court in whom the original discretion is vested. It is only after an appellant before us has demonstrated to a conviction that discretion has been wrongly exercised that we are entitled to exercise an original discretion of our own. That position does not obtain here.

We looked to counsel for some guidance in this respect but we must say, without implying the slightest disrespect that we received precious little assistance from either Encik Anantham or Encik Nathan on this aspect of the case. Counsel for the plaintiff simply invited us to exercise our own discretion while counsel for the defendant, not unnaturally, was content to say that the justice of the case lay in favour of his client. We must therefore decide upon a course that does not cause any substantial injustice to either side.

The result

Having given the matter our most anxious consideration, we are of opinion that both parties should be given an opportunity to reventilate the merits of each of their cases. It may be that Encik Nathan is well justified in his contention that the plaintiff is entirely to blame for the sorry state in which it found itself at the end of about six years after effecting service of the writ. It is also necessary to consider the defendant's submission on the question of limitation and the inability of the defendant to rely upon the compromise for a lesser sum should the writ be extended. Equally, the merits of the plaintiffs explanation for the situation that has arisen must be given due consideration. This is not a case where a writ was intentionally withheld from service. The question may then arise whether the settled practice spoken of in *Heaven*'s case applies to the facts of this case. *Essentially, all the relevant factors must be taken into account and no weight ought to be given to irrelevant considerations.*

Accordingly, we allow the appeal and set aside the order of the learned judge. We remit the defendant's summons to another judge (the learned judge no longer being available to hear this matter) with a direction for him to decide upon the merits of the defendant's application, bearing in mind all those matters to which we have called attention in this judgment. By the nature of the orders thus far made, we order that the costs of this appeal and all costs incurred todate in the court below do follow the event of the rehearing of the summons. The deposit paid into court is hereby ordered to be refunded to the appellant.

Appeal allowed.

Reported by Kevin Ooi